

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Art Unit : 3714
Examiner : David W. Duffy
Applicant : Orlando W. Stephenson III
Appln. No. : 10/810,911
Filing Date : March 26, 2004
Confirmation No. : 9439
For : GAMING MACHINE

TRANSMITTAL OF APPEAL BRIEF
(PATENT APPLICATION - 37 C.F.R. § 41.37)

1. Transmitted herewith is the APPEAL BRIEF in this application, with respect to the Notice of Appeal filed on April 9, 2008.

2. **STATUS OF APPLICANTS**

This application is on behalf of:

☐ other than a small entity.

☒ a small entity.

A verified statement:

☐ is attached.

☐ was already filed.

3. **FEE FOR FILING APPEAL BRIEF**

Pursuant to 35 U.S.C. § 41(a)(6), the fee for filing the Appeal Brief is:

☒ small entity \$255.00

☐ other than a small entity \$510.00

Appeal Brief fee due: \$255.00

4. EXTENSION OF TERM

The proceedings herein are for a patent application and the provisions of 35 U.S.C. § 41(a)(8) apply.

 x Applicant believes that no extension of term is required. However, this conditional petition is being made to provide for the possibility that applicant has inadvertently overlooked the need for a petition and fee for extension of time.

5. TOTAL FEE DUE

The total fee due is:

Appeal Brief fee: \$255.00

Extension fee (if any) \$

TOTAL FEE DUE: \$255.00

6. FEE PAYMENT

 Attached is a check in the sum of \$.

 x Charge Account No. 16 2463 the sum of \$255.00.

7. FEE DEFICIENCY

 x If any additional extension and/or fee is required, this is a request therefor and to charge Account No. 16 2463.

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and/or

x If any additional fee for claims is required, charge Account No. 16 2463.

Respectfully submitted,

April 28, 2008

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APPEAL BRIEF (37 CFR §41.37)

This brief is in furtherance of the Notice of Appeal, filed in this case on April 9, 2008.

The fees required under 35 U.S.C. § 41(a)(6), and any required petition for extension of time for filing this brief and fees therefor, are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

This brief contains these items under the following headings, and in the order set forth below (37 CFR §41.37(c)):

- I. Real Party in Interest
- II. Related Appeals and Interferences
- III. Status of Claims
- IV. Status of Amendments
- V. Summary of Claimed Subject Matter
- VI. Grounds of Rejection to Be Reviewed on Appeal
- VII. Argument
- VIII. Conclusion

Appendix of Claims Involved in the Appeal

Evidence Appendix

Related Proceedings Appendix

The final page of this brief bears the attorney's signature.

I. Real Party in Interest

The real party in interest in this application is SPEC International, the assignment to which was recorded at Reel 015162, Frame 0288.

II. Related Appeals and Interferences

There are no related appeals or interferences pending during this application.

III. Status of Claims

Claims 1-25 are pending in this application, and their rejection is the subject of this appeal. No amendments have been filed after the notice of appeal.

IV. Status of Amendments

No amendments have been filed after the notice of appeal.

V. Summary of Claimed Subject Matter

As described in the specification portion of the application (pages 1-6), and illustrated in

the related figures (Figs. 1-7), the present invention recited in the finally rejected claims generally relate to a gaming machine 1 (Figs. 1-3, pages 3-5, paragraphs [0013]-[0015]); and to a gaming machine 50 (Figs. 4-5, page 5, paragraph [0016]); and to a gaming machine 60 (Figs. 6-7, page 5, paragraph [0017]), each including a vertically adjustable cross bar (12) that allows substantial flexibility and adaptability in manufacturing gaming cabinets. (See paragraph [0002]. To avoid confusion in the following discussion, the description below refers primarily to the first embodiment, gaming machine 1, Figs. 1-3, except as necessary for some dependent claims. However, there are also some reference to items of the second and third embodiments, gaming machines 50 and 60.

More specifically, the present concepts relate to a gaming machine 1 (or 50 or 60) including a cabinet 2, a cabinet door 6 defining an opening 7, a sheet 9 (or sheets 23, 24) covering the opening 7, and a vertically adjustable cross member 12 dividing the opening 7 and adjustably supported by a bezel 17 (also called a "mount" herein) located inside cabinet 2. It is noted that the Examiner required and agreed to a change from the word "bezel" to the word "mount" in the claims, but the two words are intended to define the same subject matter, as discussed below. The adjustability of the cross member 12 is significant, as set forth in the discussion of background in the specification (page 1, paragraph [0002], and in discussion of the present invention (pages 3-5, paragraphs [0013] and [0015], and [0018] in particular).

According to claim 1, an aspect of the present invention is to provide a gaming machine 1 comprising a cabinet 2 (page 3, paragraph [0013], Figs. 1-2). The cabinet 2 defines an internal space 3 and a front side 4, the cabinet 2 having an opening 5 in the front side 4 for

providing access to the internal space 3. A door 6 is movably mounted to the cabinet 2 for movement between an open position (Fig. 2) providing access to the internal space 3, and a closed position (Fig. 1) wherein the door 6 substantially closes off the opening 5 in the cabinet 2. The door 6 has an enlarged opening 7 defining generally vertically spaced apart side edges 8. At least one sheet 9 (and also see upper and lower sheets 23, 24) is mounted to the door 6 and extends across at least a substantial portion of the opening 7 in the door 6. The sheet 9 has an outside surface 10, with at least a portion 11 of the sheet 9 being see-through. A generally horizontal cross member 12 extends across the enlarged opening 7 and has opposite ends 13 positioned adjacent the vertical side edges 8 when in any one of a plurality of vertically-adjusted positions. The cross member 12 includes fasteners 31 (Fig. 3, paragraph [0015]) removably securing the cross member 12 to the door 6 in a selected one of the vertically-adjusted positions, such that the vertical position of the cross member 12 can be adjusted during installation to vary the size of an upper portion 14 of the enlarged opening 7 above the cross member 12, and a lower portion 15 of the enlarged opening 7 below the cross member 12.

In regard to dependent claims 2-9, 22-24, the cross member 12 is disposed along the outside surface 10 of the sheet 9 (claim 2); at least a first portion 11 of the sheet 9 is substantially transparent (claim 3, paragraph [0013, last few lines]; at least a second portion 27 of the sheet 9 has a coating reducing the transmissibility of light through the sheet (claim 4, paragraph [0014]); a flat screen video display 16 is mounted to the door above the cross member, and a reel device 21 is mounted in the cabinet below the cross member (claim 5,

paragraph [0014]); a first flat screen video display 51 is mounted to the door above the cross member, and a second flat screen video display 52 is mounted to the door below the cross member (claim 6, paragraph [0016]; a first display 62 is configured to display progressive game information mounted to the door 6 above the cross member 12, and a second flat screen video display 63 is mounted to the door 6 below the cross member 12 (claim 7, paragraph [0017]; the door 6 defines an inner side facing the internal space 3, and including a mount (bezel 17) having at least one enlarged opening 41 therethrough and including mounting structure 17, 31 securing the mount (bezel 17) to the inner side of the door; and wherein the cross member is secured to the mount (bezel 17) (claim 8, Figs. 2-3, paragraphs [0014]-[0015]); the door 6 includes beveled outer surfaces 39 adjacent the vertical side edges 8, the beveled outer surfaces 39 extending inwardly towards the vertical side edges 8, and the cross member 12 has beveled opposite end portions 13 that fit closely against but that are not attached to the beveled outer surfaces 39 of the door 6 (claim 9, paragraph [0015], Fig. 3); a mount (bezel 17) removably secured to an inside of the door 6, the cross member 12 being secured to the mount 17 (claim 22, Fig. 3, paragraphs [0014]-[0015]); the mount 12 comprising a flat sheet (claim 23, Figs. 2-3, paragraphs [0014]-[0015]); first fasteners 31 attaching the mount (bezel 17) to the door 6, and second fasteners 40 attaching the cross member 12 to the mount (bezel 17), the first and second fasteners 31, 41 extending into the internal space of the machine 1 (claim 24, Figs. 2-3, paragraphs [0014]-[0015]).

According to claim 10, another aspect of the present invention is to provide a gaming machine 1 comprising a cabinet 2 (page 3, paragraph [0013], Figs. 1-2). The cabinet 2 defines

an enlarged opening 5 on a front side 4 of the cabinet 2. A door 6 is pivotably mounted to the cabinet 2, the door 6 having an enlarged opening 7 therethrough in registry with the enlarged opening 5 in the cabinet 2 when the door 6 is in a closed position (Fig. 1). A mount (bezel 17, Figs. 2-3, paragraph [0014]-[0015]) is secured to the door 6 and has an enlarged opening 19 therethrough. A cross member 12 is fastened to the mount (bezel 17) and extends across the enlarged opening 7 in the door 6, the cross member 12 adjustably engaging the door 6 to selectively divide the opening 7 but being secured by the mount (bezel 17) in a selected vertical position.

In regard to dependent claims 11-21, a screen 9 (23/24) is secured to the door 6 and extends across at least a substantial portion of the enlarged opening in the door 6 (claim 11, Figs. 2-3, paragraphs [0014]-[0015]); the screen 9 defines an outside surface, and the cross member 12 is disposed adjacent the outside surface of the screen 9 (claim 12); at least a first portion 11 of the screen 9 is substantially transparent (claim 13, paragraph [0013], Fig. 1); at least a second portion 27 of the screen 9 has a coating reducing the transmissibility of light through the screen 9 (claim 14, Figs. 2, paragraph [0014]); a flat screen video display 16 is mounted to the door 6 above the cross member 12 and a reel device is mounted in the cabinet below the cross member (claim 15, Fig. 2, paragraph [0014]); a first flat screen video display 51 is mounted to the door 6 above the cross member 12, and a second flat screen video display 52 is mounted to the door 6 below the cross member 12 (claim 16, paragraph [0016], Figs. 4-5); a first display 62 is configured to display progressive game information mounted to the door 6 above the cross member 12, and a second flat screen video display 63 is mounted to the

door 6 below the cross member 12 (claim 17, Figs. 6-7, paragraph [0017]); a video display screen 52 is mounted to the mount (bezel 17) (claim 18); first fasteners 31 attach the mount (bezel 17) to the door 6, and second fasteners 40 attach the cross member 12 to the mount (bezel 17) (claim 19, Fig. 3, paragraph [0014]); the mount (bezel 17) comprises a flat sheet (claim 20, Figs. 2-3, paragraph [0015]); and the cross member 12 includes ends abutting the door 6 but that are not attached directly to the door 6, and further the cross member 12 includes fasteners 40 extending through the mount (bezel 17) for attaching the cross member 12 to the mount (bezel 17) (claim 21, Figs. 2-3, paragraph [0015]).

According to claim 25, another aspect of the present invention is to provide a gaming machine 1 comprising a cabinet 2 (page 3, paragraph [0013], Figs. 1-2). The cabinet 2 defines an internal space 3 and a front side 4, the cabinet 2 having an opening 5 in the front side 4 for providing access to the internal space 3. A door 6 is movably mounted to the cabinet 2 for movement between an open position (Fig. 2) providing access to the internal space 3, and a closed position (Fig. 1) wherein the door 6 substantially closes off the opening 5 in the cabinet 2, the door 6 having an enlarged opening 7 defining vertical side edges 8. At least one sheet 9 (23, 24) is mounted to the door 6 and extends across at least a substantial portion of the opening 7 in the door 6, the sheet 9 having an outside surface, at least a portion 11 of the sheet 9 being see-through. A generally horizontal cross member 12 extends across the enlarged opening 7 and has opposite ends 13 positioned adjacent the vertical side edges 8 when in any one of a plurality of vertically-adjusted positions, the door 6 including attachment structure (17, 31, 40) (Fig. 3) in the internal space 3 for attaching the cross member 12 in any one of the

vertically-adjusted positions, the cross member 12 being a separate component but clamped against an outside of the door 6 and secured to the door 6 with the attachment structure 17, 31, 40 in a selected one of the positions, such that the vertical position of the cross member 12 can be adjusted during installation to vary the size of upper and lower portions of the enlarged opening 7 above and below the cross member 12.

VI. Grounds of Rejection to Be Reviewed on Appeal

Claims 1-25 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,475,087 to Cole in view of U.S. Patent Application Publication No. 2003/0157978 A1 to Englman et al.

VII. Argument

A. Rejection of Claims 1-25 under 35 U.S.C. § 103(a) as being unpatentable Over U.S. Patent No. 6,475,087 to Cole in view of U.S. Patent Application Publication No. 2003/0157978 A1 to Englman et al.

As further discussed below, Applicants respectfully submit that a *prima facie* case of obviousness has not been established for several reasons, including the fact that a key element defined in the claims is not shown by any of the cited art, and also since it is not obvious to make the combination proposed by the Examiner, and also because even if combined the resulting combination does not arrive at the present invention as claimed.

The test for obviousness has recently been addressed by the U.S. Supreme Court in *KSR Int'l. Co. v. Teleflex, Inc.*, 82 U.S.P.Q.2d 1385 (2007). In its decision, the Supreme

Court stated that the teaching-suggestion-motivation (TSM) standard developed by the Federal Circuit was no longer the sole test for determining obviousness; but the Court indicated that the TSM test provides helpful insights as to the obviousness of the invention. Furthermore, according to M.P.E.P. § 2142:

The key to supporting any rejection under 35 U.S.C. § 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious. The Supreme Court in *KSR International Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1741; 82 U.S.P.Q.2d 1385, 1396 (U.S. 2007) noted that the analysis supporting a rejection under 35 U.S.C. § 103 should be made explicit. The Federal Circuit has stated that "rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *In re Kahn*, 441 F.3d 977, 988, 78 U.S.P.Q.2d 1329, 1336 (Fed. Cir. 2006). See also *KSR*, 127 S.Ct. 1727; 82 U.S.P.Q.2d at 1396 (quoting Federal Circuit statement with approval).

By way of background, please note that some claims were initially rejected under 35 U.S.C. § 112, the Examiner taking the position that "bezel" (i.e., bezel 17) was unclear. This rejection was addressed after a telephone interview by substituting the word "mount" for the word "bezel." The subsequent amendment made it clear for the record that the change was done to expedite prosecution, but that the term "bezel" was used and understood by skilled artisans in this industry, and also that the term "mount" was being substituted therefore based on the Examiner's requirement. Specifically, the response stated, "Thus, this amendment to the claims is not believed to adversely affect a broad reading of the scope of these claims, especially under the Doctrine of Equivalents analysis."

Claim 1 defines a gaming machine comprising a cabinet defining an internal space and a front side, the cabinet having an opening in the front side for providing access to the internal

space. A door is movably mounted to the cabinet for movement between an open position providing access to the internal space, and a closed position wherein the door substantially closes off the opening in the cabinet. The door has an enlarged opening defining generally vertically spaced apart side edges. At least one sheet is mounted to the door and extends across at least a substantial portion of the opening in the door. The sheet has an outside surface, with at least a portion of the sheet being see-through. A generally horizontal cross member extends across the enlarged opening and has opposite ends positioned adjacent the vertical side edges when in any one of a plurality of vertically-adjusted positions. The cross member includes fasteners removably securing the cross member to the door in a selected one of the vertically-adjusted positions, such that the vertical position of the cross member can be adjusted during installation to vary the size of an upper portion of the enlarged opening above the cross member, and a lower portion of the enlarged opening below the cross member.

In all claims, the adjustability of the cross member is significant, as set forth in the discussion of background in the specification (page 1, paragraph [0002], and in discussion of the present invention (page 3-5, paragraphs [0013] and [0015], and [0018] in particular).

Claims 10 and 25 are also in independent form. The details of claims 10 and 25 will not be repeated here in order to save space, but it is noted that they include some similar claim elements and terminology. Claims 10 and 25 are different from claim 1 in at least the following way: Claim 1 further recites “fasteners removably securing the cross member to the door in a selected one of the vertically-adjusted positions” (see claim 1). Claim 10 defines a cross member fastened to a mount, “the cross member adjustably engaging the door to selectively

divide the opening but being secured by the mount in a selected vertical position.” Claim 25 defines a cross member that is “a separate component but clamped against an outside of the door and secured to the door with the attachment structure in a selected one of the positions.”

As an initial point, U.S. Patent No. 6,475,087 to Cole (hereafter “Cole ‘087 patent”) discloses a gaming cabinet but does not disclose any cross member. The Examiner admits this. (See the final Office Action mailed February 11, 2008, page 3, paragraph 7, last sentence: “Cole lacks disclosing a cross member across the opening.”)

As a second initial point, U.S. Patent Application Publication No. 2003/0157978 A1 to Englman (hereinafter referred to as “Englman ‘978”) discloses a gaming machine with a door defining an opening and a cross member dividing the opening into upper and lower portions. However, the cross member in the Englman ‘978 publication appears fixedly attached to the door in a permanent position such that it cannot be adjusted. Notably, any attempt to remove the cross member in Englman ‘978 would damage an appearance of its door, resulting in substantial and extraordinary additional expense of reworking of the cabinet. Thus, based on a reasonable reading, the cross member in Englman ‘978 is not removable (as defined claim 1), nor supported using a mount (as defined in claim 10), nor clamped (as defined in claim 25).

More specifically, the present concepts focus on a cross member that can be adjustably secured to a gaming cabinet door for dividing its front opening into upper and lower portions, each adjustable in size. This is very beneficial because it allows gaming cabinet doors, which are expensive and complicated structural members, to have their openings selectively divided late in the assembly/manufacturing process (or in a refurbish or retrofit or “updating” process)

into upper and lower window portions optimally designed for particular games. This is important since games change so often in today's gaming industry. Historically, the cross members were integrally permanently secured to the door, such that no such adjustment of their cross member was possible after the door's "shell" was created. This results in a cost penalty and reduction in manufacturing flexibility, since doors with "set" openings must be thrown away and/or totally replaced in order to change a size of the openings, which is expensive. Concurrently, it is expensive and impractical to cut off the permanently secured cross members and re-attach them, making this alternative unrealistic. Further, if a cross member is cut off, the appearance of the door is damaged, causing the need for expensive secondary operations.

The cited patent, Cole 6,475,087, discloses a gaming cabinet with a front opening. Notably, Cole '087 does not disclose any cross member. Cole '087 does disclose that its (single window-like) panel (68) is attached to his door (see Fig. 3) and is replaceable. The panel (68) may provide a "screening function" since it can have one or more opaque portions (70) and transparent portions (72) thereon. (Column 6, line 53.) However, "opaque portions" are not equivalent to cross members since they are painted flat surfaces. Further, opaque portions are fixed medium on the "window-like panel" of Cole '087, and they are not adjustable in any sense. Notably, the bracketry for holding the panels (68) is fixed to the door and is not adjustable either, nor does it permit adjustment of the panel (68).

The cited publication, Englman publication 2003/0157978 A1, discloses a gaming machine with a door defining an opening and a cross member dividing the opening into upper

and lower portions. However, the cross member in Englman '978 is permanently attached to the door in a fixed position such that it cannot be adjusted. The details of attachment of the cross member are not found in Englman '978, but nothing in Englman '978 suggests that the cross member is adjustable, nor removable, nor attached with fasteners. In fact, Englman '978 has the very problem solved by the present invention. Specifically, since Englman's cross member is permanently set and cannot be adjusted, Englman's door is limited to games that match predetermined upper and lower opening sizes in the door. In order to retrofit Englman's cabinet for a new game with differently sized upper and lower window openings, Englman's door must be thrown away and replaced.

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on Applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991).

As noted above, claim 1 recites a gaming machine including, among other things, a cabinet defining an internal space, a door for closing off the cabinet, at least one sheet mounted to the door that is in part see-through, and a horizontal cross member extending across the enlarged opening. The cross member has "opposite ends positioned adjacent the vertical side

edges when in any one of a plurality of vertically-adjusted positions” and includes “fasteners removably securing the cross member to the door in a selected one of the vertically-adjusted positions, such that the vertical position of the cross member can be adjusted during installation to vary the size of an upper portion of the enlarged opening above the cross member, and a lower portion of the enlarged opening below the cross member.”

As noted above, Cole ‘087 does not disclose any cross member. Englman ‘978 discloses a cross member, but the cross member is fixed. Englman ‘978 does not disclose or suggest a cross member that is adjustable, nor removable, nor attached with fasteners. In fact, Englman ‘978 has the very problem solved by the present invention. Specifically, since Englman’s cross member is permanently set and cannot be adjusted, Englman’s door is limited to games that match predetermined upper and lower opening sizes in the door. Cole ‘087 discloses an arrangement where its (window-like single) panel can be replaced. However, “replacement” is not the same as adjustment, nor does it satisfy the claim requirement of “fasteners removably securing the cross member to the door in a selected one of the vertically adjusted positions.”

Thus, the first criteria for an obviousness rejection is not met (i.e., that there must be some suggestion or motivation either in the references themselves or in the knowledge generally available to one of ordinary skill in the art to modify the reference or to combine reference teachings). The attached Expert Declaration supports the position that this first criteria is not met. The rejection in the Office Action does not adequately address this deficiency of the references.

The Office Action states on page 4, paragraph 10, that “one skilled in the art would recognize that there are limited options in how to attach the cross member . . . ,” and then the Office Action suggests various ways that it could be attached . . . without pointing to any support in the Englman ‘978 reference. The Office Action further states, “[I]t would have been obvious to one skilled in the art . . . to try attaching the cross member (of Englman ‘978) to the display sheet or mount (of Cole ‘087).” This statement is conclusory and unsupported. Cole ‘087 doesn’t include any cross member. Englman ‘978 has a panel attached to its door to cover a front of its door’s opening, but nothing suggests adjustability, nor the fastener attachment defined.

The recent Office Action on page 2, paragraphs 2-4 criticizes the Expert Declaration under 35 U.S.C. § 1.132 (copy attached). In paragraph 3, the Office Action suggests that “there is no showing that others of ordinary skill in the art were working on the problem” However, the Expert Declaration (see attachment) states in paragraph 10, “However, consumers now expect and demand quicker ‘title changes’ Concurrently, manufacturers of cabinets have inventory problems from overproduction of ‘out-of-style’ gaming cabinets.” Certainly, this clearly shows that people of ordinary skill in the art were had this problem. It is not necessary for Applicant to show that people in the art were ‘working on the problem’ . . . though it certainly can be inferred that people normally work to overcome the problems they are having.

In paragraph 3, the Office Action further states, “In addition, there is no evidence that if persons skilled in the art . . . knew of the teaching of the above cited references, they would

still be unable to solve the problem.” However, the Expert Declaration (see attachment) considers the prior art in its paragraphs 11-19, and concludes that a person skilled in the art would NOT make the combination of Cole ‘087 and Englman ‘978. In particular, notice paragraphs 12-14 which address the teachings in Cole ‘087 and Englman ‘978, and notice paragraph 15 which states, “In my opinion, it would not be possible for a person of ordinary skill in this art to come up with such a substantial innovation as defined in claim 1 . . . due in part to the fact that there is no teaching or suggestion of structure to support an adjustable cross member in a gaming cabinet.” This statement clearly implies that there is no teaching or suggestion of an adjustable cross member in any prior art, including Cole ‘087 and Englman ‘978 (which are the references noted by the Examiner).

Paragraph 4 of the Office Action states, “It (the Declaration) includes statements which amount to an affirmation that the Affiant has never seen the claimed subject matter before.” The Expert Declaration states in paragraph 5, “I have also seen (and purchased) gaming cabinets embodying this invention from SPEC International, the assignee of this application.” The Expert signing the Declaration clearly has seen and in fact purchased gaming cabinets embodying the present invention, and further, as noted in paragraph 1 of the Expert Declaration, “I have an intimate knowledge of . . . competitive products and alternative constructions in the industry.”

The second criteria for an obviousness rejection is that there must be a reasonable expectation of success. Since the cited art does not disclose or suggest an adjustably-positioned cross member, how can there be any chance of “a reasonable expectation of success”? It is

fundamental that part of an invention can be discovery or recognition of a problem. Further, the teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in Applicant's disclosure. M.P.E.P. § 2143; *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991). The attached Expert Declaration supports the lack of any "expectation of success" under this second criteria on the basis that gaming cabinet doors have been made like "vaults" for years. Hence, there is no expectation of success in trying to come up with a vertically adjustable cross member, which is a substantial step away from a "vault-like" solid structure, especially where the gaming industry expects fixed, solid, permanent, vault-like doors.

Finally, a third criteria for an obviousness rejection is that the prior art reference (or references when combined) must teach or suggest all the claim limitations. As noted above, they don't. Specifically, the present invention provides a new function (i.e., vertically adjustable cross member) which is not shown or suggest in the art. Also, see the attached Expert Declaration which supports this position.

The U.S. Supreme Court in *KSR Int'l v Teleflex, Inc*, 127 S.Ct. 1727; 82 U.S.P.Q.2d 1385 (U.S. 2007) took the position that the test for obviousness was broader than a simple test of "teaching, suggestion, or motivation." However, the KSR decision does not change the fact that the elements and/or function must be shown or suggested in the art. In fact, the KSR decision specifically encourages a common sense approach. In the present case, neither cited art of Cole '087 and/or Englman '978 show or suggest a vertically-adjustable cross member, nor even a reason to modify the existing art to make one. Applicant argues that it is not

“common sense” to combine a first reference that does not include any cross member (i.e., Cole ‘087) with second reference showing a permanently secured cross member (i.e., Englman ‘978) to reject claim 1 which requires a cross member that is removably secured by fasteners in a selected vertically-adjusted position, as defined in claim 1. The benefits of such a unique construction are not foreseeable, except through hindsight that uses the teaching of the present specification . . . which is improper.

In regard to secondary considerations supporting the unobviousness of the present invention, the attached Expert Declaration (e.g., paragraph 8) supports that the present invention as defined in claim 1 resolves a long-felt but unresolved need in the industry for reconfigurable gaming cabinets that are able to be reconfigured to support changing games in this industry . . . without having to throw away existing gaming cabinets (or at least throw away and replace expensive complex doors). As noted in the Expert’s Declaration (paragraph 8, last sentence), “I was impressed with the significance of this inventive concept when I saw it.” Thus, the Expert confirms that, in his mind, the present invention has contributed to the present Applicant’s success in the marketplace (based on the Expert’s statement, keeping in mind that he is a person who buys and sells gaming machines – paragraph 1 in the Expert Declaration). The Expert further states in paragraphs 14 and 16 that “in my opinion, it is illogical to combine Cole. . . with Englman.” Thus, the Expert believes it would be counterintuitive to combine this cited art (i.e., the prior art teaches away from the present invention) for various reasons, including due to an overriding antitheft-mentality (i.e., the gaming cabinets should be “vault-like”) in gaming industry (see paragraph 9 of the Expert

Declaration).

The claims 2-9 and 22-24 depend from base claim 1 and are allowable since claim 1 is allowable for the reasons given above. These claims 2-9 and 22-24 are also allowable since they define unobvious combinations with the subject matter of claim 1. For example, the cited art (including Cole '087 and Englman '978) do not disclose or suggest a mount as defined (claims 8 and 22), nor a door and cross member with mating beveled surfaces, where the cross member fits closely against but is not attached to the beveled outer surface of the door (claim 9), a flat mount (claim 23), nor first and second fasteners as defined (claim 24).

Claim 10 is also patentable over Cole '087 and Englman '978 for reasons similar to those given above in regard to claim 1. Claim 10 recites a gaming machine including, among other things, a cabinet having a front side, a door pivotably mounted to the cabinet with an enlarged opening, and a mount secured to the door and having an enlarged opening therethrough. A cross member is fastened to the mount and extends across the enlarged opening in the door. The cross member adjustably engages the door to selectively divide the opening but is secured by the mount in a selected vertical position.

As noted above, Cole '087 does not disclose any cross member. Englman '978 discloses a cross member, but the cross member is fixed. Englman '978 does not disclose or suggest a cross member that is adjustable, nor removable, nor attached with fasteners to a mount. In fact, Englman '978 has the very problem solved by the present invention. Specifically, since Englman's cross member is permanently set and cannot be adjusted, Englman's door is limited to games that match predetermined upper and lower opening sizes in

the door. Also, neither Cole '087 nor Englman '978 disclose a mount secured to a door and a cross member fastened to the mount, with the cross member fastened and secured to the mount in a selected vertical position.

Thus, the first criteria for an obviousness rejection (i.e., that there must be some suggestion or motivation either in the references themselves or in the knowledge generally available to one of ordinary skill in the art to modify the reference or to combine reference teachings) is not met. The attached Expert Declaration supports the position that this first criteria is not met. The rejection in the Office Action does not address this deficiency of the references.

We note that the same arguments and comments apply for the patentability of the invention of claim 10 as were stated above in regard to claim 1, in regard to the cited art of Cole '087 and Englman '978, and in regard to the Expert Declaration.

The second criteria for an obviousness rejection is that there must be a reasonable expectation of success. Since the cited art does not disclose or suggest an adjustably-positioned cross member, nor a mount for securement when in a selected vertical position, how can it be concluded that there is "a reasonable expectation of success"? It is fundamental that part of an invention can be discovery or recognition of a problem. Further, the claimed element and also the teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in Applicant's disclosure. M.P.E.P. § 2143; *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991). The attached Expert Declaration supports the lack of any "expectation of success" under this second criteria on the

basis that gaming cabinet doors have been made like “vaults” for years. Hence, there is no expectation of success in trying to come up with a vertically adjustable cross member, which is a substantial step away from a “vault-like” solid structure, especially where the gaming industry expects fixed, solid, permanent, vault-like structures. Further, the prior art does not teach or suggest a mount capable of supporting a cross member in a fastened position when in a selected vertical position.

Finally, a third criteria for an obviousness rejection is that the prior art reference (or references when combined) must teach or suggest all the claim limitations. As noted above, they don't. Specifically, the present invention provides a new function (i.e., vertically adjustable cross member) which is not shown or suggest in the art. Also, see the attached Expert Declaration which supports this position.

As noted above, the U.S. Supreme Court in *KSR Int'l v Teleflex, Inc*, 127 S.Ct. 1727; 82 U.S.P.Q.2d 1385 (U.S. 2007) took the position that the test for obviousness was broader than a simple test of “teaching, suggestion, or motivation.” However, the KSR decision does not change the fact that the elements and/or function must be shown or suggested in the art, or at least suggested by a logical reason not based on hindsight reasoning and that is based on a likelihood of success from known structural elements. The KSR decision specifically encourages a common sense approach. In the present case, neither cited art of Cole '087 and/or Engلمان '978 show or suggest a vertically-adjustable cross member, nor a mount as defined, nor even a reason to modify the existing art to make such members. Applicant argues that it is not “common sense” to combine a first reference that does not include any cross

member (i.e., Cole '087) with second reference showing a permanently secured cross member (i.e., Engلمان '978) to reject claim 10 which requires a cross member that is fastened to a mount in a selected vertically-adjusted position, as defined in claim 10. The benefits of such a unique construction are not foreseeable, except through hindsight that uses the teaching of the present specification . . . which is improper.

Secondary considerations also support the unobviousness of the present invention. Like claim 1, the present invention as defined in claim 10 resolves a long felt but unresolved need in the industry for reconfigurable gaming cabinets that are able to be reconfigured to support changing games in this industry . . . without having to throw away existing gaming cabinets (or at least throw away and replace expensive complex doors). As noted in the Expert's Declaration, the present invention has contributed to the present Applicant's success in the marketplace, and is believed to be counterintuitive (i.e., the prior art teaches away from the present invention) due to an overriding antitheft-mentality (i.e., the gaming cabinets should be "vault-like") in gaming industry.

The claims 11-21 depend from base claim 10 and are allowable since claim 10 is allowable for the reasons given above. These claims are also allowable since they define unobvious combinations with the subject matter of claim 10. For example, the prior art does not teach or suggest first and second fasteners as defined (claim 19), a mount comprising a flat sheet (claim 20), nor a cross member with ends abutting the door and fasteners as defined (claim 21).

The new claim 25 defines a gaming machine including, among other things, a cabinet

defining an internal space, a door for providing access to the internal space, the door having an enlarged opening defining vertical side edges, at least one sheet mounted to the door with a portion being see-through, and a generally horizontal cross member extending across the enlarged opening. The cross member has opposite ends positioned adjacent the vertical side edges when in any one of a plurality of vertically-adjusted positions. The door includes attachment structure in the internal space for attaching the cross member in any one of the vertically-adjusted positions, where “the cross member being a separate component but clamped against an outside of the door and secured to the door with the attachment structure in a selected one of the positions.” By this arrangement, the vertical position of the cross member can be adjusted during installation to vary the size of upper and lower portions of the enlarged opening above and below the cross member.

The cited art does not disclose or suggest any such arrangement as defined by claim 25. In particular, the cited art (including Cole ‘087 and Engلمان ‘978) does not disclose or suggest several items defined in claim 25 and that are also found in claims 1 and 10 . . . which items are not found in the prior art as argued above in regard to claims 1 and 10. The prior art also does not disclose or suggest a cross member that is a separate component clamped against an outside of a door but secured with attachment structure in a selected (vertically-adjusted) position, as defined in claim 25.

We note that the same arguments and comments apply for the patentability of the invention of claim 25 as were stated above in regard to claims 1 and 10, in regard to the cited art of Cole ‘087 and Engلمان ‘978, and in regard to the Expert Declaration.

VIII. Conclusion

As discussed above, the cited art of Cole '087 and Englman '978 does not disclose or suggest the invention(s) as defined in the present claims . . . especially in regard to a cross member that is held in a vertically adjusted position (e.g., by fasteners, or by a mount, or by being clamped).

For all of the above reasons, the Board is respectfully requested to reverse the rejection, and to cause a Notice of Allowability for claims 1-25.

Respectfully submitted,

April 28, 2008
Date

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DLG/dlc

Appendix of Claims (37 C.F.R. § 41.37(c))

1. A gaming machine, comprising:

a cabinet defining an internal space and a front side, the cabinet having an opening in the front side for providing access to the internal space;

a door movably mounted to the cabinet for movement between an open position providing access to the internal space, and a closed position wherein the door substantially closes off the opening in the cabinet, the door having an enlarged opening defining generally vertical spaced apart side edges;

at least one sheet mounted to the door and extending across at least a substantial portion of the opening in the door, the sheet having an outside surface, at least a portion of the sheet being see-through; and

a generally horizontal cross member extending across the enlarged opening and having opposite ends positioned adjacent the vertical side edges when in any one of a plurality of vertically-adjusted positions, the cross member including fasteners removably securing the cross member to the door in a selected one of the vertically-adjusted positions, such that the vertical position of the cross member can be adjusted during installation to vary the size of an upper portion of the enlarged opening above the cross member, and a lower portion of the enlarged opening below the cross member.

2. The gaming machine of claim 1, wherein:

the cross member is disposed along the outside surface of the sheet.

3. The gaming machine of claim 2, wherein:
at least a first portion of the sheet is substantially transparent.
4. The gaming machine of claim 3, wherein:
at least a second portion of the sheet has a coating reducing the transmissibility of light through the sheet.
5. The gaming machine of claim 4, wherein:
a flat screen video display is mounted to the door above the cross member; and
a reel device is mounted in the cabinet below the cross member.
6. The gaming machine of claim 4, including:
a first flat screen video display mounted to the door above the cross member; and
a second flat screen video display mounted to the door below the cross member.
7. The gaming machine of claim 4, including:
a first display configured to display progressive game information mounted to the door above the cross member; and
a second flat screen video display mounted to the door below the cross member.

8. The gaming machine of claim 1, wherein:

the door defines an inner side facing the internal space; and including:

a mount having at least one enlarged opening therethrough, and including mounting structure securing the mount to the inner side of the door; and wherein the cross member is secured to the mount.

9. The gaming machine of claim 8, wherein:

the door includes beveled outer surfaces adjacent the vertical side edges, the beveled outer surfaces extending inwardly towards the vertical side edges; and

the cross member has beveled opposite end portions that fit closely against but that are not attached to the beveled outer surfaces of the door.

10. A gaming machine, comprising:

a cabinet having an enlarged opening on a front side of the cabinet;

a door pivotably mounted to the cabinet, the door having an enlarged opening therethrough in registry with the enlarged opening in the cabinet when the door is in a closed position;

a mount secured to the door and having an enlarged opening therethrough; and

a cross member fastened to the mount and extending across the enlarged opening in the door, the cross member adjustably engaging the door to selectively divide the opening but being secured by the mount in a selected vertical position.

11. The gaming machine of claim 10, including:

a screen secured to the door and extending across at least a substantial portion of the enlarged opening in the door.
12. The gaming machine of claim 11, wherein:

the screen defines an outside surface; and

the cross member is disposed adjacent the outside surface of the screen.
13. The gaming machine of claim 12, wherein:

at least a first portion of the screen is substantially transparent.
14. The gaming machine of claim 13, wherein:

at least a second portion of the screen has a coating reducing the transmissibility of light through the screen.
15. The gaming machine of claim 10, wherein:

a flat screen video display is mounted to the door above the cross member; and

a reel device is mounted in the cabinet below the cross member.
16. The gaming machine of claim 10, including:

a first flat screen video display mounted to the door above the cross member; and
a second flat screen video display mounted to the door below the cross member.

17. The gaming machine of claim 10, including:

a first display configured to display progressive game information mounted to the door
above the cross member; and

a second flat screen video display mounted to the door below the cross member.

18. The gaming machine of claim 10, wherein: a video display screen is mounted to the
mount.

19. The gaming machine of claim 10, including first fasteners attaching the mount to the
door, and second fasteners attaching the cross member to the mount.

20. The gaming machine of claim 10, wherein the mount comprises a flat sheet.

21. The gaming machine of claim 10, wherein the cross member includes ends abutting the
door but that are not attached directly to the door, and further the cross member includes
fasteners extending through the mount for attaching the cross member to the mount.

22. The gaming machine of claim 1, including a mount removably secured to an inside of

the door, the cross member being secured to the mount.

23. The gaming machine of claim 22, wherein the mount comprises a flat sheet.

24. The gaming machine of claim 22, wherein the fasteners include first fasteners attaching the mount to the door, and second fasteners attaching the cross member to the mount, the first and second fasteners extending into the internal space of the machine.

25. A gaming machine, comprising:

a cabinet defining an internal space and a front side, the cabinet having an opening in the front side for providing access to the internal space;

a door movably mounted to the cabinet for movement between an open position providing access to the internal space, and a closed position wherein the door substantially closes off the opening in the cabinet, the door having an enlarged opening defining vertical side edges;

at least one sheet mounted to the door and extending across at least a substantial portion of the opening in the door, the sheet having an outside surface, at least a portion of the sheet being see-through; and

a generally horizontal cross member extending across the enlarged opening and having opposite ends positioned adjacent the vertical side edges when in any one of a plurality of vertically-adjusted positions, the door including attachment structure in the internal space for

attaching the cross member in any one of the vertically-adjusted positions, the cross member being a separate component but clamped against an outside of the door and secured to the door with the attachment structure in a selected one of the positions, such that the vertical position of the cross member can be adjusted during installation to vary the size of upper and lower portions of the enlarged opening above and below the cross member.

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Evidence Appendix (35 USC §41.37(c))

An Expert Declaration was submitted during prosecution of this application under 37 CFR §1.132 and is discussed in the remarks of this Appeal Brief. There was no other evidence submitted during this application under 37 CFR §1.130, 1.131 or 1.132 or any evidence entered by the Examiner and replied upon by Appellant in the appeal.

Related Proceedings Appendix (35 USC §41.37(c))

There are no related appeals or interferences pending during this application.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Art Unit : 3714
Examiner : David W. Duffy
Applicant : Orlando W. Stephenson III
Appln. No. : 10/810,911
Filing Date : March 26, 2004
Confirmation No. : 9439
For : GAMING MACHINE

EXPERT DECLARATION UNDER 37 USC SECTION 132
IN SUPPORT OF APPLICATION SERIAL NO. 10/810,911

I, Jason Sprinkle, hereby declare as follows:

1. I presently am Director of Operations for Video Gaming Technology Inc. (hereafter "VGT", see our website www.vgt.net), which makes, buys, and sells gaming machines and related equipment. I have been Director of Operations for 12 years, and have experience as treasurer and as chief operating officer. I also have directed the operations of two other companies related to VGT. I have an intimate knowledge of providing products for the gaming and casino industry, including competitive products and alternative constructions in the industry.
2. My background education includes a Bachelor's degree in electronics from Greenville Technical College, South Carolina, in 1991.
3. I am intimately aware of gaming cabinets available in the industry, and believe myself to be qualified as an expert person skilled in this art.

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4. I note that I have been listed as a co-inventor on several U.S. patents, including 6,423,764; 6,559,216; 6,602,447; 6,835,333; 6,875,811; 6,891,058; and 7,014,797, such that I am generally familiar, as a layman, with patents.
5. I have read and carefully considered the specification, drawings, and claims of the present application serial no. 10/810,911, filed March 25, 2004, entitled GAMING MACHINE, assigned to SPEC International (hereafter referred to as "the SPEC '911 application"). My review included studying the proposed claim amendments in the response attached hereto, as well as the arguments/remarks provided in that response. I have also seen (and purchased) gaming cabinets embodying this invention from SPEC International, the assignee of this application.
6. I have read and studied the present Office Action in regard to the rejection of claims, and read and studied the two documents cited by the Examiner of the Patent Office, i.e., Cole U.S. Patent No. 6,475,087 and Englman Published Application U.S. 2003/0157978.
7. I note that the present counsel and I have discussed the legal requirement for an Examiner to find that a proposed claim is rendered obvious over prior art, including the adequacy of prior art and the standard for patentability under US patent laws such as 35 U.S.C. §§ 102 and 103.

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8. In my opinion, the present concept of a vertically adjustable cross member on a gaming cabinet door is new, useful, and unobvious. It provides a new door structure with a function that I have not seen in doors of gaming cabinets that existed prior to filing the present application. It solves a long felt need in this industry, . . . that being a gaming cabinet having a door construction with a cross member that is adjustable to accommodate new games without total replacement of the existing door. I was impressed with the significance of this inventive concept when I saw it.

STATE OF THE ART

9. The doors of gaming cabinets traditionally have been built like vault doors, with heavy, solid, and integrally-connected, permanently-secured door frame members and cross members. They tend to be expensive and complex. Their vault-like configuration has been an acceptable practice since the internal gaming mechanisms and games/themes were used for long periods, and security in this industry has long been an issue.
10. However, consumers now expect and demand quicker "title changes" (i.e., changes in games), with consumer interest often dropping noticeably after only a few months of use (such as only 6 months). Gaming cabinets built like "vaults" are not able to accommodate this change without great capital expense (and turnover time to make the change) borne by the owner of the gaming cabinet. As the

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owners resist the additional capital investment for new games and cabinets, the existing ones soon become "dribblers" with lower usage and concurrently, lower profits. Concurrently, manufacturers of cabinets have inventory problems from over-production of "out-of-style" gaming cabinets. As manufacturers resist making large inventories of components (doors) since they do not want to manufacture obsolete doors, the delivery times extend out unacceptably in this fast-paced industry. Despite this, I am not aware of anyone addressing this need in the manner stated in the claims of this patent application prior to its filing date. I consider this to fill a long-felt need in this industry, but add that part of it was a lack of recognition of the problem.

COMMENT ON CITED PRIOR ART

11. The Office Action cites Cole U.S. Patent No. 6,475,087 in rejecting the claims. The Cole '087 patent discloses a gaming apparatus with a video display mounted to the cabinet's door. However, the Cole '087 patent does not disclose any cross member. The panel 68 (Fig. 3) in the Cole '087 patent is removably held by brackets, but it is not vertically adjustable. Nor is vertical adjustability suggested, in my opinion. Any opaque areas on the panel of Cole are totally different than a cross member as defined, in my opinion, since opaque areas have a very different visual and structural result.

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12. The Office Action also cites Englman published application 2003/0157978 in rejecting the claims. The Englman '978 application discloses a gaming apparatus with a cross member. However, the cross member in the Englman '978 application appears integrally fixed to the door. It has the same problem found in prior art. It would be expensive and impractical to try and cut off the permanently secured cross member in Englman for several reasons. For example, cutting off a permanently secured cross member from a door would be prohibitively expensive due to the time-consuming manually-intensive work required, and would be impractical due to the difficulty in accomplishing a visually-acceptable final product.
13. The Office Action combines the Cole '087 patent and Englman published application 2003/0157978 in rejecting the claims. I respectfully disagree, because neither of them disclose or suggest any structure including any adjustable cross member as defined. Cole does not have any cross member, and Englman's cross member is fixed. To the extent that Cole has a replaceable panel, it still is not vertically adjustable. Further, any opaque area on the panel of Cole is totally different than a cross member with structure, as defined in the present claim, in my opinion.
14. Further in my opinion, it is illogical to combine Cole (which has no cross member) with Englman (which has the problem of a fixed cross member) to reject claim 1

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which recites a totally new adjustable cross member providing a totally new function.

15. In my opinion, it would not be possible for a person of ordinary skill in this art to come up with such a substantial innovation as defined in claim 1, in part due to the prior art in this industry which teaches away from any such innovation, and due in part to the fact that there is no teaching or suggestion of structure to support an adjustable cross member in a gaming cabinet.
16. In my opinion, it is illogical to combine Cole (which has no cross member) with Engلمان (which has the problem of a fixed cross member) to reject claim 10 which recites a totally new cabinet, a door, a mount attached to the door, and a cross member adjustably engaging the door and attached to the mount in a selected vertical position. This structure supports a totally new function not found in the prior art. In my opinion, it would not be possible for a person of ordinary skill in this art to come up with this, since there is no teaching or suggestion of the arrangement of components, nor the function, to support the adjustable cross member.
17. In my opinion, it would not be possible for a person of ordinary skill in this art to come up with such a substantial innovation as defined in claim 10, in part due to the prior art in this industry which teaches away from any such innovation, and due in part to the fact that there is no teaching or suggestion of structure to support

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an adjustable cross member attached to a mount, where the mount is in turn attached to the door of a gaming cabinet.

18. In my opinion, there are also several dependent claims that recite structure not disclosed or suggested in Cole and/or Englman. For example, Cole and/or Englman do not disclose or suggest:

- a. A bezel secured to the door and the cross member secured to the mount (claim 8), in combination with fasteners (claim 1).
- b. First and second fasteners as defined (claims 19, 24)
- c. A mount comprising a flat sheet (claims 20, 23)
- d. Fastener as defined (claim 21)

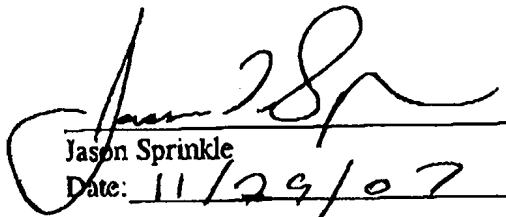
19. In my opinion, claim 25 should also be patentable because none of the prior art discloses or suggests a cross member attached to attachment structure of a door, with the attachment structure being in the internal space of a cabinet, the cross member being a separate component clamped against an outside of the door and adjustable as defined.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of

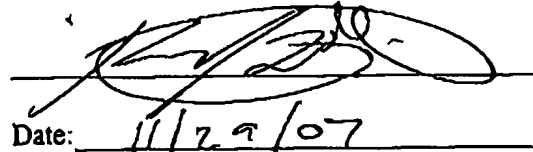
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the United States Code, and that such willful false statement may jeopardize the validity of the application or any patent issued thereon.

Further I say not.


Jason Sprinkle
Date: 11/29/07

WITNESS


Date: 11/29/07